United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1471

To be argued by
JONATHAN J. SILBERMANN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

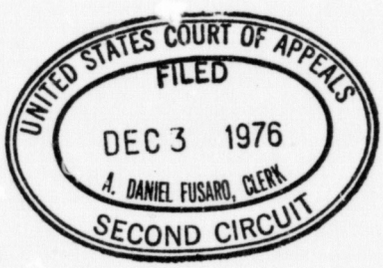
LARRY LOMBARDI,

Defendant-Appellant.

Docket No. 76-1471

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHNRN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- LARRY LOMBARDI, Defendant-Appellant.	Docket No. 76-1471

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the admission into evidence of Yuin's prior testimony given at the separate trial of appellant Lombardi's co-defendants was error and requires reversal.

2. Whether the District Court's instructions that appellant's modest style of life was proof that he obtained heroin with the intent to distribute it was error requiring reversal.

3. Whether the Assistant U.S. Attorney's failure to retain Yuin's diaries despite the District Court's directive requires remand of this case for a hearing to determine the effect of these circumstances.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant, Jr.) rendered on October 8, 1976, after a jury trial, convicting appellant Larry Lombardy of conspiring to possess heroin with intent to distribute (Count I) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846) and six counts of possessing heroin with intent to distribute (Counts VII, IX, XI, XII, XVII, and XVIII) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)). Appellant was sentenced to concurrent terms of imprisonment of ten years on each count and to a term of three years' special parole.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment[1]

On June 28, 1975, an indictment was filed charging appellant and Sammy Cho, Cheung Kin Ping, Lai Mong Wah, and Chang Yu

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[1]The indictment is B to the separate appendix to appellant's brief.

Ching with violations of the federal narcotics laws.[2] Specifically, the indictment charged appellant Lombardi with conspiracy (Count I) and possession of heroin with intent to distribute it on nine separate days in September, November, and December 1971 (Counts VII, IX, XII, XII, XIV-XVIII).

B. The Trial of Cheung Kin Ping ("Cheung") and Lai Mong Wah ("Lai")

The trial of co-defendants Cheung and Lai commenced on June 7, 1976. On June 9, 1976, during the course of testimony of Yuin Kwei Sang ("Yuin"), a named co-conspirator who testified on behalf of the Government, the Assistant U.S. Attorney informed the District Court that, during the luncheon recess, Yuin had informed the prosecutor that Yuin had kept a diary. The Assistant U.S. Attorney represented that the diary was in Chinese and that it covered the period from January 1, 1975, to the date of trial. Further, he argued that the diary was not 3500 material since it was not in the Government's possession.

The District Court was concerned that the diary might contain Brady material, and therefore suggested that it be marked for identification, directing "that the diary be made

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[2]Other identified individuals, including Yuin Kwei Sang, as well as others known and unknown to the grand jury, were named as co-conspirators.

available but not to be taken out of the U.S. Attorney's office, and either or both of the interpreters look at it, and if there is anything that might pass for Brady material, I'll recall [Yuin] later in the trial and let you bring it out" (C.255-259[3]). Later, the District Court repeated his instructions that Yuin remain until the interpreter could examine the diary and that "it's my wish that the diary not be taken from the court house" (C.273).

That same day, the District Judge inquired as to the progress made in translating the diary. During the course of this discussion, the Assistant U.S. Attorney suggested that the diary be retained by the Government and reviewed for any exculpatory Brady material, which he would submit to the defendants. Any questionable material would be given to the Judge. The District Court agreed with this procedure (C.299), explaining that defense counsel and their interpreters would not be allowed to examine the diary since Yuin had a privacy interest in it, but that if no right of privacy was involved, "then for Heaven's sake, let [defense counsel] look at it" (C.301-302).

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[3]Numerals in parentheses preceded by "C" refer to pages of the transcript of the trial of appellant Lombardi's co-defendants, Cheung and Lai. All pages from the transcript of that trial relevant to the District Court's disposition of questions involving Yuin's diary are included as D to the separate appendix to appellant's brief. Numerals in parentheses preceded by "L" refer to pages of the transcript of appellant Lombardi's trial.

On June 10, 1976, during the course of a progress report on the translation of the diaries[4] (C.374-378), the Assistant U.S. Attorney revealed that he had returned the diaries to Yuin and had asked the witness to choose any passages dealing with his relationship with the Government or with his testimony in the case (C.378). Upon learning that Yuin had custody of the diaries, defense counsel for co-defendant Lai moved for a mistrial. The motion was denied. Counsel vigorously protested, explaining that the diaries had been given 3500 numbers, that any slight change might distort the meaning of the Chinese characters, that allowing the diaries to be returned to Yuin was unconscionable, and that he had been under the misapprehension that the diaries had been retained by the Assistant U.S. Attorney. The District Court's response was that counsel had made his motion, protecting the record, whereupon counsel requested that the diaries be taken from Yuin to avoid further actions that might alter any writings (C.389-381).

On June 11, 1976, an additional progress report on the diaries' translation was given by the Assistant U.S. Attorney, who stated that he had spoken with Yuin's lawyer about revealing the contents of the diaries and that the translation was proceeding (C.591-592). Counsel for co-defendant Lai inter-

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[4] During the course of trial, it was discovered that the "diary" consisted of two books -- a hardbound volume and a soft cover spiral notebook (C.299, 301, 474).

posed a standing objection to Yuin's retention of the diaries. The District Judge expressed his belief that it had been agreed that Yuin was supposed to have the diary only in the presence of an interpreter or the Assistant U.S. Attorney.

The Assistant U.S. Attorney told the Judge that he was mistaken, that Yuin still had the diaries, since "we can't sit over the witness' shoulder" (C.593). The District Court then requested that a copy of the material be made to preserve the chain of custody (C.594).

On June 14, 1976, portions of the diaries were given to defense counsel, who immediately asked why the Government had failed to turn over that portion of the diaries written in English that related to benefits Yuin was to receive for his cooperation with the Government. The Assistant U.S. Attorney said that he would supply an answer to that question by the end of the day (C.690). No answer was forthcoming.

The following day, after the remaining portions of the diary had been given to defense counsel, co-defendant Lai's attorney protested that sections of the diaries relating to Yuin's cooperation with the Government were now missing (C.877), and requested a mistrial based on Yuin's removal of pages from the spiral notebook (C.941, 942, 945-946). Although the District Court twice suggested that a hearing would be held to determine whether Yuin had tampered with the diaries and whether Yuin's representations to the Government that no pages had been removed (C.957) were truthful (C.943, 958), no such

hearing was ever conducted.[5]

C. Appellant Lombardi's Trial

Prior to trial, on the Government's motion, Counts XIV-XVI, charging appellant's possession of heroin on three separate days, were dismissed with prejudice.

1. Evidence Relevant to the Charges Against Appellant

The evidence of appellant's guilt was based almost exclusively on the testimony of Yuin Kwei Sang, a co-conspirator and convicted narcotics dealer, who had previously testified at the trial of appellant's co-defendants and whose continued custody of the diaries caused the motion for a mistrial in the earlier proceedings. Yuin testified that during the early fall or late summer of 1971, he met appellant at co-defendant Lai's apartment (L.85), where they discussed future narcotics transactions (L.87). According to Yuin, in the fall of 1971, he sold various quantities of heroin to appellant (L.88-90, 93-98, 111-112, 114, 116-118).

During his description of one of these transactions, Yuin stated that in October 1971 he was introduced to appellant's

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[5]Co-defendants Cheung and Lai were convicted, and judgments of conviction entered on July 26, 1976. Their case is sub judice in this Court, oral argument having been heard on the appeal on November 5, 1976.

nephew, while Yuin, appellant, and the nephew counted the proceeds of one of the deals (L.108). Further, Yuin testified that in the fall of 1971 he met Sammy Cho; that Sammy Cho told Yuin he had 15 pounds of heroin for sale and inquired whether Yuin had contacts for its sale; that Yuin first took five pounds of the narcotics, and then, at a later date, ten more pounds; and that Yuin sold some of this heroin to appellant for $80,000 to $90,000 (L.109-111). According to Yuin, on another occasion, Yuin put heroin in the trunk of a car driven by appellant's nephew (L.116).

During the course of Yuin's direct testimony, appellant's trial counsel requested that Yuin's diaries be made available (L.99-103). The Assistant U.S. Attorney refused to turn them over, stating that "there is nothing that would suggest that there was anything in the diary which is in the nature of Brady" (L.131). Despite counsel's explanation that previous investigations by other counsel could not bind his own efforts, the District Court, calling the question "a tempest in a teapot," declined to direct that the Government produce the Yuin diaries. Instead, the Judge "deemed part of this record everything that took place in the prior trial pertaining to the diary, because I am relying on everything concerning the diary that took place before" (L.132, 134).

Defense counsel conducted cross-examination of Yuin, at the conclusion of which a stipulation was read to the jurors. In that stipulation, the Government "conceded that Mr. Yuin

never testified before the grand jury or in the prior trial in this case regarding Larry's nephew or any transactions with him" (L.182).

On re-direct examination, the Assistant U.S. Attorney attempted to enter into evidence portions of Yuin's prior testimony given at the trial of appellant's co-defendants. Defense counsel objected to this procedure (L.189). However, the District Court permitted the prior testimony, ruling that implicit in Yuin's cross-examination and the relevant stipulation was the argument that the testimony about Lombardi's nephew was a recent fabrication and that the Government could meet this inference by prior consistent testimony (L.189-190). Despite trial counsel's further explanation that the proffered testimony did not concern the nephew at all and should therefore be excluded, the District Judge simply adhered to his prior ruling (L.190). Thus, the jurors were told that Yuin had previously testified to the following: that in September/October, Yuin met Sammy Cho; that Cho had 15 pounds of narcotics and asked Yuin if he had connections for distribution; that Yuin took five pounds, which was sold to appellant; and that Yuin later purchased ten more pounds from Sammy Cho (L.188). In addition, Yuin's prior testimony, that appellant paid Yuin $15,000 per kilo for 15 pounds of heroin and that appellant sometimes reduced the price, was entered into evidence (L.190-191).

Chiu Kwan Tsi testified that in the fall of 1971 he rented

an apartment at 95 East Broadway to appellant, whom he knew as Thomas Tripolino, and that appellant lived there until the end of 1974 (L.195-197). The rent was $50 per month (L.198).

Rudolph Guinta testified that from the middle of 1971 until May or June 1972, he had sublet a store to appellant (L.205). The store was located at 24 Eldridge Street, and in it appellant sold clothes, toys, and "all kinds of garbage" (L.206).[6]

2. The Evidence of the Conspiracy Charged

Drug Enforcement Administration agent John Taylor testified to three purchases of heroin from Yuin in November 1971 (L.17-19, 23-26, 41-43). Yuin himself explained that he had been involved in the heroin trade since 1968 (L.71). In 1970 he met Lai and Chang Yu Ching, two of appellant's co-defendants (L.73). In 1970, Yuin, Lai, and Chang each contributed $1,500 for the purchase of heroin. Chang bought the narcotics in Hong Kong (L.74), and the heroin was later sold in the United States by Yuin to, among others, a Dr. Liu (L.75-76). Yuin testified to a second shipment of heroin that was arranged by Yuin, Lai, and Chang (L.80-82). In December 1971, Yuin, Lai, and two others -- Sammy Cho and Cheung Kin Ping -- went to

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[6] In addition, DEA agent Mathew Maher testified that on November 23, 1971, he saw Yuin, carrying a brown paper bag, go into the building at 95 East Broadway (L.211, 215).

Hong Kong (L.135-136). There, Yuin arranged for the purchase and importation into the United States of approximately 20 pounds of heroin (L.137), which was seized at its port of arrival in April 1972 (L.141).

D. Summation and Charge[7]

As the Assistant U.S. Attorney himself recognized, evidence of appellant's guilt rested almost entirely on the credibility of Yuin, a heroin dealer and alleged accomplice. During summation, the Assistant U.S. Attorney argued that Yuin's story was amply corroborated, contending that his prior testimony at Lai Mong Wah's trial showed that Yuin was now telling the truth:

> Yuin told that jury, as he told you in this jury, sitting here just like yourselves, they were, about the narcotics activities of this defendant at that trial. Why on earth would he then -- when Mr. Lombardi was not a defendant, testify against him falsely? There is no motive at all. He testified against his own partner at that trial, Lai Mong Wah.
>
> (L.281-282).

In the course of his instructions to the jurors, the District Court told them that an element of the crime of possession was the intent to distribute. Over objection (L.353), the District Judge stated that, in determining whether the

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[7] The District Court's charge to the jury is C to the separate appendix to appellant's brief.

drugs were possessed with the requisite intent:

> [T]he record appears to show that Lombardi lived modestly in an old tenement house on East Broadway, that he had a store in which items of small value were sold and that his life style would hardly suggest that he could pay such large amounts of money unless he was intending to resell it.
>
> (L.343).

After deliberations, the jurors returned with a verdict finding appellant guilty as charged.

ARGUMENT

Point I

THE ADMISSION INTO EVIDENCE OF YUIN'S PREVIOUS TESTIMONY GIVEN AT THE SEPARATE TRIAL OF APPELLANT LOMBARDI'S CO-DEFENDANTS WAS ERROR AND REQUIRES REVERSAL.

In the course of his testimony about numerous narcotics transactions, Yuin Kwei Sang, a named co-conspirator and convicted heroin dealer, testified that appellant Lombardi's nephew had been involved in some of the transactions. The defense attempted to impeach Yuin's credibility by the conceded fact that Yuin had never before testified that appellant's nephew had been involved in any narcotics dealings.[8] In order to rehabilitate this witness, upon whose testimony appellant's conviction was predicated, and specifically to show that Yuin was not lying about appellant's nephew, Yuin's prior testimony about his narcotics dealings with Sammy Cho and appellant was read to the jury. The District Court allowed the evidence on the theory that it was consistent testimony offered to rebut the claim that Yuin had recently fabricated the facts concerning appellant's nephew. However,

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[8] Trial counsel also attempted to impeach the witness' credibility by showing the advantages Yuin was obtaining from the Government and the leniency he hoped to gain at sentencing. On September 16, 1976, Judge Brieant sentenced Yuin to time served and to a three-year special parole term.

as trial counsel reiterated, the testimony simply did not relate to appellant's nephew, and was irrelevant to Yuin's trial testimony about the specific facts in question. It was, rather, a mere repetition of the co-conspirator's testimony about previous narcotics dealings which were not pertinent to the veracity of the testimony about appellant's nephew. The admissibility of this testimony, over objection, was error requiring reversal.

The general proposition is clear that the use of prior consistent statements to bolster trial testimony is precluded by the rule against hearsay. Grunenthal v. Long Island Railroad Co., 388 F.2d 480, 483 (2d Cir. 1968); United States v. Bays, 448 F.2d 977, 979 (5th Cir. 1971); United States v. Leggett, 312 F.2d 566, 573 (4th Cir. 1962). However, an exception to this rule exists. Its most recent formulation, found in Rule 801(d)(1)(B) of the Federal Rules of Evidence allows prior testimony given by a declarant if it is

> consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

See also Felice v. Long Island Railroad Co., 426 F.2d 192, 198 (2d Cir.), cert. denied, 400 U.S. 820 (1970); United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972); United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir. 1970). As Wigmore explains:

> The charge of recent contrivance is usually made, not so much by affirmative evidence,

> as by negative evidence that the witness did not speak of the matter before, at a time when it would have been material to speak.... The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.
>
> 4 WIGMORE ON EVIDENCE, §1129 (Chadbourn rev. 1972).

Thus, one simple requirement for the use of a prior consistent statement is that the statement, in fact, be consistent with the trial testimony that is impeached. Here, Yuin testified for the first time that appellant's nephew was involved in narcotics transactions with appellant. However, the statements read to the jurors had nothing to do with the culpability of appellant's nephew, and thus did not comply with the requirement. To the contrary, Yuin's prior statements were irrelevant to the claim that Yuin was lying about the disputed fact. As such, the testimony read to the jury impermissibly bolstered Yuin's testimony.

Moreover, a second prerequisite for the use of prior consistent testimony is that the statement be made prior to the motive disclosed in cross-examination for the claimed fabrication. Felice v. Long Island Railroad Co., supra, 426 F.2d at 198; United States v. DiLorenzo, supra, 429 F.2d at 220; United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972); United States v. DeLaMotte, 434 F.2d 289, 293 (2d Cir. 1970); see 4 Weinstein and Berger, EVIDENCE, at 801-100 (1975).

Here, the motive shown at appellant's trial -- leniency from the District Court and benefits from the Government for co-operation -- were precisely the same as those existing at the trial of appellant's co-defendants, the time of the prior statements. Thus, the assurance of reliability -- that the earlier statements preceded the motive to lie -- is completely lacking in this case. Without this assurance, the prior statements lack any probative value whatsoever:

> Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force "for the simple reason that mere repetition does not imply veracity."
>
> 4 Weinstein and Berger, EVIDENCE, supra, at 800-100.

Thus, the District Court failed to insure compliance with any of the prerequisites necessary for the use of prior consistent statements. Moreover, the statements themselves were extremely prejudicial. Not only did they unnecessarily repeat testimony about narcotics transactions, but they implied proof of veracity that simply did not exist. Indeed, the Assistant U.S. Attorney used the statements for this purpose in his summation (L.281-282), arguing that the repetition of the statements was proof of the credibility of the co-conspirator. Because the use of the co-conspirator's prior statements was error and because Yuin's credibility was the critical issue in the case and essential to conviction, reversal is required.

Point II

THE DISTRICT COURT'S INSTRUCTIONS THAT APPELLANT'S MODEST STYLE OF LIFE WAS PROOF THAT HE OBTAINED HEROIN WITH THE INTENT TO DISTRIBUTE IT WAS ERROR REQUIRING REVERSAL.

The standard for examining the propriety of comments made by a district judge while discussing evidence at trial is clear:

> The trial judge in a federal court may summarize and comment upon the evidence and inferences to be drawn therefrom, in his discretion.... The purpose of such summation and comment is to assist the jury in winnowing out the truth from the mass of evidence.... So long as the trial judge does not by one means or another try to impose his own opinions and conclusions as to the facts on the jury and does not act as an advocate in advancing factual findings of his own, he may in his discretion decide what evidence he will comment upon.
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> United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970).

See also Quercia v. United States, 289 U.S. 466 (1933); United States v. Araujo, 539 F.2d 287, 291 (2d Cir. 1966); Ah Lou Koa v. American Export Isbrandsten Lines, Inc., 513 F.2d 261, 263-264 (2d Cir. 1975); United States v. DeLaMotte, supra, 434 F.2d at 292.

Here, in discussing the proof relevant to show the intention to distribute -- a necessary element of the crime charged -- the District Judge told the jurors:

> [T]he record appears to show that Lombardi lived modestly in an old tenement house on East Broadway, that he had a store in

> which items of small value were sold and that his life style would hardly suggest that he could pay such large amounts of money unless he was intending to resell it.
>
> (L.343).

Despite trial counsel's objection, the Judge refused to change his instructions (L.353). These improper comments unmistakably signalled the Judge's belief that appellant intended to distribute the heroin possessed, and communicated the court's acceptance of the truth of the Government's contention about these facts.

Moreover, these instructions had no logical tendency to establish the element in issue. To the contrary, appellant's modest financial circumstances were more probative of a claim of innocence than any other contention, since they refuted the possibility that appellant obtained a profit from narcotics dealings, the usual motive ascribed to such activities. Thus, rather than guide the jurors in their quest for truth, the Judge's comment interjected into their considerations an idea that was not likely to occur to them because it was illogical and that had the effect of causing the jurors to believe that, no matter what the evidence of innocence, it could be rationalized with a theory of guilt.[9]

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[9]Although the District Judge did tell the jurors that the question of intent to distribute was to be their determination, this advice did not cure the error that had already occurred. Quercia v. United States, supra, 289 U.S. at 472; Ah Lou Koa v. American Exports, supra, 513 F.2d at 264; United States v. Tourine, supra, 428 F.2d at 870.

Point III

THE ASSISTANT U.S. ATTORNEY'S FAILURE TO RETAIN YUIN'S DIARIES DESPITE THE DISTRICT COURT'S DIRECTIVE REQUIRES REMAND OF THIS CASE FOR A HEARING TO DETERMINE THE EFFECT OF THESE CIRCUMSTANCES.

During the course of co-conspirator Yuin's testimony at the earlier trial of appellant's co-defendants, the Assistant U.S. Attorney told the Judge of diaries kept by Yuin, recording events contemporaneous with his cooperation with the Government. The District Judge ordered that the Assistant U.S. Attorney keep possession of the diaries. In disregard of this directive that he retain these materials, the Assistant U.S. Attorney returned them to the witness without insuring their integrity. During the proceedings of that prior trial, defense counsel did receive what the Assistant U.S. Attorney believed were the diaries written by Yuin. However, upon receipt, defense counsel for co-defendant Lai immediately expressed his belief that portions of the diary were now missing. Despite the District Court's suggestions that Brady material might be involved and that a hearing would be held to determine whether any tampering had occurred, no hearing was ever conducted to examine the facts at issue.

At appellant's trial, defense counsel requested that the diaries be made available to him. Rather than allowing counsel to examine the material, the District Judge deemed the record at the prior trial relating to the diary part of the record in

this case. Thus, a hearing must now be granted to determine the questions left open by the previous proceedings -- whether any foul play was involved and, if so, whether a new trial is required in light of the applicable standards. United States v. Morrell, 524 F.2d 550, 553-554 (2d Cir. 1975); United States v. Hilton, 521 F.2d 164 (2d Cir. 1975); see also United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975).

Moreover, the need for a hearing to determine the relevant facts is especially crucial here, since defense counsel in this case was precluded from even examining the diaries and since the record that does exist indicates that the Assistant U.S. Attorney's return of the diaries to Yuin was intentional, being in disregard of the District Court's explicit directive to retain them. In this light, the conclusion is unmistakable that if evidence merely material or favorable to the defense was thereby suppressed, a new trial must be granted, United States v. Miranda, supra, 526 F.2d at 1325-1329, especially since appellant's conviction rested solely on the credibility of a single prosecution witness. See Brach v. United States, Doc. No. 76-2040, slip op. 5487, 5491 (2d Cir., September 9, 1976).

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 3, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silberstein